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In The
Supreme Court of the United States

October, 1992 Term

No. _____

GARY McKNIGHT,

Petitioner,

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Gary McKnight, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on September 11, 1992.

QUESTIONS PRESENTED

I. Whether the court below, judicial decisions operate contrary to well established United States Supreme Court holdings and that of the legislative intent of the United States Congress in regards to the relevant statutes and Senate Conference report H.R. 1746, 118 Congressional record 7166, 7168 concerning section 706(g) thereof?

II. Whether the Court below, determines not to provide the petitioner a Hearing on the matter of resolving remanded issues involving complex claims of entitlements of the relevant statutes of Title Seven 42 U.S. C. 2000(e)-5, was contrary to that of sound judicial purpose.

III. Whether the Court below is permitted to deny established entitlements, that if provided would be consistent with the principle meaning of the relevant statute and judicial determinations of this court, to provide some restoration in the direction of "make whole" remedy of the provisions in regards to reinstatement, front pay in lieu of reinstatement or some other remedial form for the aggrieved?

IV. Whether the Court below determines should be allowed to operate in disregard to the reality and factual matters regarding actual damages and all forms of damages caused the aggrieved petitioner by the unlawful conduct of the respondent, and in direct conflict with constitutional principles?

V. Whether the Court below either abused or misapplied its "broad discretion" regarding the denial of reinstatement or in lieu thereof front pay; and denying preinterest on the original judgment while the petitioner is saddled with inequity?

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OPINION BELOW

The opinion of the Court of Appeals affirms that of the District Court of the Eastern District of Wisconsin as to deny the Petitioner remanded entitlements involving reinstatement, in lieu thereof front pay and preinterest on the original Judgment awarded available under the relevant statute pursuant to Title VII.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on September 11, 1992. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). It is found in Article III, section II of the United States Constitution provides that the judicial power vested in the Supreme Court pursuant to Article III, section I apply to "all cases, in law and equity, arising under this constitution, the laws of the United States."

STATUTORY PROVISIONS INVOLVED

The provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-5; and in part to the relevant subsections of the United States Senate Conference report H.R. 1746, 118 Congressional record 7166, 7168 concerning §706(g) thereof as to the legislative purpose of the statute.

STATEMENT OF THE CASE

In October of 1988 the Petitioner, Gary McKnight prevailed on his claim in the District Court for the Eastern District of Wisconsin that the Defendant, General Motors Corporation, unlawfully terminated him from his employment in retaliation for filing complaints of race discrimination and because of his race. The Petitioner pursued his case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq., and 42 U.S.C. §1981, of the Civil Rights Act of 1866. The Petitioner's Title VII claims were to be resolved by the District Court pursuant to the operants of the relevant statutes

and the 42 U.S.C. claims were determined by a jury in District Court. A Judgment was entered for the Petitioner, Gary McKnight, in the amount of $610,000.00, plus attorneys fees. More specifically, the jury awarded $55,000.00 in back pay, another $55,000.00 for emotional distress and $500,000.00 in punitive damages. The entitlements of reinstatement to the Petitioner's former position was denied on account of the Defendant's hostility, the trial court determined without evidentiary hearing that General Motors was hostile and the parties at best were acrimonious. The trial court further positioned itself for the denial of reinstatement on the foundation of the jury award, and said that reinstatement of the Petitioner, Gary McKnight, to his former position would not advance the purposes of the statute. The Petitioner, with full knowledge of the trial court judge's determination not to reinstate him on the grounds of the defendant General Motors "hostility a tremendously large employer who has almost a variety of relative positions to accommodate the Petitioner,

McKnight, the Petitioner, Gary McKnight, provided a request for consideration of alternative positions of reinstatement in order to get his job back and the career he had lost and to get around what the trial judge determined as hostility of Defendant as a direct result of the unlawful conduct. The trial judge in the district court denied the Petitioner reinstatement further. i.e., *McKnight v. General Motors Corp.*, 705 F.Supp 464 (E.D. Wis. 1989).

The Respondent, General Motors, appealed the judgment except for attorneys fees awarded to the plaintiff and Petitioner appealed his Title VII portion denying reinstatement and in lieu thereof front pay.

In June of 1989, this matter was pending on appeal, while at the same time the United States Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989) which pertains to §1981 regarding the unlawful conduct of discrimination that occurs during the initial formation and making of contract; that is, that conduct which occurs during

the initial hire of an employment relationship and not post-formative conduct as in regards to following the initial hire.

The Court of Appeals for the Seventh Circuit decided, during this matter's pending on appeal, to apply the *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989) should be applied retroactively to obviate a substantial remedy provided to the Petitioner, McKnight. See *McKnight v. General Motors Corp.*, 9a8 F.2d 104, 110-11 (7th Cir. 1990). The Court of Appeals had determined that the Petitioner's §1981 claims were not available and remanded to the District trial court below the matter of reinstatement on the ground that the Defendant, General Motors, should not be allowed to benefit from its own hostility and that the size of the remaining judgment, a second consideration of the trial judge for his denying reinstatement in the first instance, has been substantially reduced. The matter of front pay if reinstatement was not practical, was also remanded to the Trial Judge for consideration. The Court of Appeals determined in the first instant that reinstatement is

available under Petitioner's surviving entitlement under Title VII of the Civil Rights Act, 42 U.S.C. §2000 etc.(e), *McKnight v. General Motors Corp.*, 908 F.2d 104, 110-11 (7th Cir. 1990).

On remand the District trial court held that the Petitioner, McKnight, is to be denied the only relief to "make whole" the Petitioner, i.e., see *Albermarle Paper Co. v. Moody,* (Nos. 74-389 and 74-428 10 FEP, 422 U.S. 405, 418-419 (1975). The District Court more specifically denied Mr. McKnight reinstatement to his former position or a neutral alternative position of the large employer whose reservoir of positions are many, on the grounds of suggestion of the Petitioner, McKnight's request to consider an alternative position if the trial judge continued denial of reinstatement to his former position because the Defendant was hostile, this obviated the Petitioner, McKnight's career and offered him nothing in return. See *McKnight v. General Motors Corp.*, 768 F.Supp. 675 (E.D. Wis. 1991). The District Trial Court

further denied the plaintiff (Petitioner) front pay in lieu thereof on the grounds that the jury did not establish loss of future earnings capacity at the time of trial although testimony was offered that there was, in fact, a loss of future earnings capacity caused by the unlawful conduct of the Defendant, General Motors Corporation. In fact, the jury knew of the original judgment awarded the plaintiff and did not know that the trial judge who did not reinstate the plaintiff (Petitioner) to his former position as the trial was held in 1988 and the reinstatement and front pay issues were decided after the verdict of the jury, before entry of judgment and again decided by the trial court July 15, 1991. The Defendant, General Motors Corporation, in accordance with the relevant statute, posted a Supersedas Bond to satisfy statutory requirements concerning the original judgment and interest concerns thereof during the pendency of the appeal involving the original judgment. The Supersedas Bond was released on remand. A claim for what was left of the judgment ($55,000.00) asserted.

The Petitioner also asserted the matter of preinterest on what was left of the original judgment ($55,000.00). The Trial Court further denied preinterest on the judgment and did not consider any other form of remedy to "make whole" the Petitioner. See *McKnight v. General Motors Corp.*, 768 F.Supp. 675 (E.D. Wis. 1991); and that of *Albermarle Paper Co. v. Moody*, 422 U.S. 405 418-419 (1975).

The Petitioner, McKnight, appealed the issue of reinstatement, front pay in lieu of reinstatement and the matter regarding the issue of "preinterest". The defendant (Respondent), General Motors, cross-appealed the issue of attorneys fees and costs and not making that available to the Petitioner during the pendency of that appeal for that of the Seventh Circuit of the remanded issues taken back up again.

On September 11, 1992 the U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the District Court of the Eastern District of Wisconsin.

The U.S. Court of Appeals denied the Petitioner's claims to reinstatement and front pay on the testimony of the defense's own argument as to what the Petitioner, McKnight's career objectives are. This is speculative and highly prejudicial. The unlawful conduct as perpetrated by the defendant, General Motors, have resulted in occupational harm to the Petitioner and should be resolved accordingly, i.e., *Sampson v. Murray*, 415 U.S. 61, 68, 90 (1974). The U.S. Court of Appeals for the Seventh Circuit also denied the Petitioner appellant the in lieu thereof reinstatement "front pay" on the grounds that it is speculative and that "the longer a proposed front pay period, the more speculative the damages become", i.e., *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056 (7th Cir. 1990). This is in conflict with the broad discretion so vested in the trial court to provide an equitable remedy to the plaintiff for his injuries.

In *Sampson v. Murray*, the United States Supreme Court commented that "in extraordinary cases irreparable

injury might be found in discharge cases as to warrant preliminary injunctive relief". i.e., *Sampson v. Murray*, 415 U.S. at 96 415 U.S. 61 N68 (1974).

Reinstatement, in general, is the most favored form of equitable relief, it usually is accompanied with an award of back pay. In *McMullan v. Thornburgh,* 508 F.Supp. 1044 (E.D. Pa 1981) the court held that "the unlawfully discharged employee had a superior claim to the position", and ordered reinstatement.

Chief Justice Rehnquist, in his opinion regarding the relevant issue here, determined that the "thrust of §703(H) of Title VII to be the authority to challenge, the failure to grant seniority or reinstatement is that of a discriminatory practice because it perpetuates the effects of pre-act discrimination, *ante* at 12."

The determination of the court below is in conflict with well established holdings of many courts as to the matter involving reinstatement and front pay issues before it. See

Davis v. San Francisco Municipal Ry, 11 FEP 1397, 1400 (N.D. Cal 1975); also, *United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318, 1328, 11 FEP 787, 794 (9th Cir. 1975).

Courts have held opinions approving front pay. See *Patterson v. American Tobacco Co.*, 535 F.2d 257, 12 FEP 314 (4th Cir. 1976); also *Curtis v. Loether*, 415 U.S. 189, 195 (1974). *Id.* 12 FEP at 323 N.10; *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985).

REASONS FOR GRANTING OF WRIT

I. The Decision Below is Contrary and Conflict With Well Established Judicial Holding of Most Courts and Does not Confer with the Intent of this Court.

The United States Supreme Court decided on June 25, 1975 in its holdings in *Albermarle Paper Company v. Moody*, 422 U.S. 405, 418-419 (1975) that the objective here was to "make whole" the aggrieved party of unlawful discriminatory conduct. The court here also held that in instances the remedy of "back pay" alone is not sufficient to provide "make whole"

relief. The fact here is that the Petitioner has not been made whole with his reduced remedy.

The United States Supreme Court also held in *Sampson v. Murray,* 415 U.S. 61 N68 at 96 (1974) that "in extraordinary cases irreparable injury might be found in discharge cases as to warrant preliminary injunctive relief". In fact if one could fathom, General Motors' involvement here is an extraordinary case and, given it's notoriety, the involvement alone could cause irreparable harm to the plaintiff.

In *Miller v. Swisse Holding, Inc.*, (D.C. NY 7/18/91) 56 FEP Cases 1332, the District Court ordered reinstatement at salary comparable to what he would have achieved had he not been discharged.

The Supreme Court has clearly stated that "the unmistakable purpose of §703(h) was to provide immunity for the operation. An application of a bona fide seniority system", see *Transworld Airlines, Inc. v. Hardison,* 432 U.S. 63, 82, 975 Ct. 2264, 14 FEP cases 1697.

Several circuit courts have attempted to move in the direction of providing the aggrieved individual with "make whole" remedy in keeping with the intent of sound judicial offering by either reinstating the unlawfully terminated employee or providing him other equitable forms of remedy in the form of "front pay". See *Daniels v. Essex Group, Inc.*, (D.C. N. Ind 6/27/90) 53 FEP Cases 482, i.e. *Deloach v. Delchamps, Inc.*, (CA5) 4/6/90 52 FEP Cases 1121.

It was proven in the case of *McKnight v. General Motors*, 973 F.2d 1366 (7th Cir. 1992) that a deliberated wrong of unlawful conduct had been perpetrated against the Petitioner and requires an adequate form of redress. "The general rule is that when a wrong has been done, and the law gives remedy, the compensation shall be equal to the injury. The injured part is to be placed as near as may be in the situation he would have occupied if the wrong had not been committed. Quoting *Wicker v. Hoppock*, 6 Wall. 94, 99 (1897), the court quoted:

> In the opinion of Chief Justice Burger, "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interest".

See *Lemon v. Kurtzman,* 411 U.S. 192, 201 (1973).

The court below did not conform to these holdings or reasons and is in conflict with the purpose and objectives therein.

These conflicts and judicial holdings provide some foundation as to justify the allowance certiorari to review the judgment below.

II. The Decision Below Provides Substantial Digression as to its Discretion as Not to Conform With the Trial Court's Vested Authority of Broad Discretion to Fully Restore and "Make Whole" the Aggrieved Under the Relevant Statute of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. and That of Senate Conference Report H.R. 1746, 118 Congressional Record 7166, 7168 Concerning §706(g).

It was Congress' intent in §706(q)118 Congressional Record 7168 (1972) "to give the courts wide discretion to

exercise their equitable powers to fashion the most complete relief possible. The expansive language of Section 706(g) and the 1972 legislative history support directives to the district courts to provide "make whole" relief liberally and not refuse it arbitrarily as to their determinations of redress for the aggrieved person. Discretion is vested to provide the most complete achievement and advancement of the objectives of Title VII that is attainable under the facts and circumstances of a particular case. The court below is not in keeping with the objectives to provide "make whole" remedy.

Accordingly, the district courts denial of any form of seniority or relief must be reviewed in terms of the objectives of the statute. There is nothing in the statute that would draw a conclusion that Congress intended that statutory language ignored, or vest authority therein the trial court to wipe out the remedies available to the aggrieved person on a presumption created by the trial court contrary to the objectives of "making whole" that person.

To quote Chief Justice Burger, "Although retroactive benefit-type seniority relief may sometimes be appropriate and equitable, competitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be a monetary award to the person suffering the discrimination, an award such as 'front pay' could replace the need for competitive type seniority relief." *See, ante,* at 28 n.38.

In *Franks v. Boman Transportation Co.*, 495 F2d 398 (1974), U.S. Court of Appeals for the Fifth Circuit, the United States Supreme Court clearly indicated that the interests must bend to the overriding legislative policy in favor of "making whole" those who themselves were victims of the unlawful conduct thereof.

The court below conflicts with these clearly established objectives of the intent of the legislature. The court below also conflicts with other circuit courts. Quite clearly, the objective here does not advance the purpose of that of Title VII §2000e.

The legislature has required reinstatement of an unlawfully discharged employee by an employer, when an employee has proven a violation of unlawful conduct or that of discrimination because of race, color, creed or sex. See *Equal Employment Act of 1972*, U.S.C. §2000e-5(g)(1974), i.e. *Ezekial v. Winkley*, 20 Cal. 3d. 267, 142 Cal. Rptr. 418, 572, P.2d 32 (1977) won reinstatement for not being able to estimate money damages.

The eligible member should be placed back in the position which was his to enjoy had it not been for the unlawful conduct. See *Rios v. Enterprise Assn. Steamfitters Local 638 of UA*, 501 F.2d 622 (1974) U.S. Court of Appeals Second Circuit (New York).

CONCLUSION

For the aforementioned reasons, the allowance of certiorari to review the Judgment and Opinion of the Court below, of the Seventh Circuit.

Thank you for the consideration you have given this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-1379, 89-1526

Date July 2, 1990

BEFORE: Honorable Richard A. Posner, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Thomas E. Fairchild, Senior Circuit Judge

GARY McKNIGHT,

Plaintiff-Appellee, Cross-Appellant

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 87 C 248- **Judge Myron L. Gordon.**

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED insofar as it awards McKnight back pay under Title VII, but otherwise REVERSED with directions to dismiss McKnight's section 1981 claims and REMANDED for reconsideration of his entitlement to reinstatement (or in lieu thereof to front pay) under Title VII. There shall be no award of costs in this Court and Circuit Rule 36 shall not apply on remand. These directions are in accordance with the opinion of this Court filed this date.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2989, 91-2990

GARY McKNIGHT,

Plaintiff-Appellant, Cross-Appellee,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 87 C 248-**Myron L. Gordon,** Judge.

Argued June 8, 1992--Decided September 11, 1992

Before BAUER, *Chief Judge,* CUMMINGS, *Circuit Judge,* and FAIRCHILD, *Senior Circuit Judge.*

BAUER, *Chief Judge.* In this appeal, we review for the second time Gary McKnight's claim that he should be

reinstated to his employment at General Motors Corporation ("GM"). We first reviewed his claim in 1990, after he won a jury verdict on a 42 U.S.C. §1981 claim and a judgment under Title VII. *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990) (*"McKnight II*). On the §1981 claim, the jury awarded McKnight $55,000 in compensatory damages, $55,000 in back pay, and $500,000 in punitive damages. The jury awarded no damages based on impairment of future earning capacity. On the Title VII claim tried before the court, the judge declined to order GM to reinstate McKnight. The only other relief McKnight requested under Title VII was back pay, which was rendered superfluous by the jury's $55,000 back-pay award. *McKnight v. General Motors Corp.*, 705 F.Supp. 464, 468 (E.D. Wis. 1989)(*"McKnight I"*).

We reversed the verdict under §1981 in light of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and remanded those claims to the district court for dismissal. *McKnight II*, at 908 F.2d at 115,117. We upheld the Title

VII verdict, and affirmed McKnight's back-pay award under that theory. We also directed the court to reconsider its refusal to reinstate McKnight and to determine, if reinstatement was not appropriate, whether McKnight should receive front pay in lieu of reinstatement. *Id.* We direct interested readers to *McKnight I* and *II* for the underlying facts in this case.

On remand, the district court reconsidered its reinstatement order, and again declined to order GM to reinstate McKnight or to award front pay. The court also denied McKnight's motion to reconsider that decision. Written opinions on both decisions were published in *McKnight v. General Motors Corp.*, 768 F.Supp. 675 (E.D. Wis. 1991)(*"McKnight III"*). McKnight appeals, arguing that the court abused its discretion in denying the relief he requests. He also contends that the court disobeyed our instructions in *McKnight II* on remand because it did not reopen the record and take evidence on McKnight's then-current financial condition, employment status, and his relationships with

existing GM employees. McKnight also argues that he was entitled to prejudgment interest, and that the district court abused its discretion in refusing to award it. On cross-appeal, GM argues that the attorneys' fees award entered after trial pursuant to a stipulation by the parties should be reduced in light of our dismissal of McKnight's §1981 claims. We shall discuss each claim in turn.

Reopening the Record

We do not believe the district court abused its discretion in declining to reopen the record or in refusing to order reinstatement or front pay. In its initial opinion, *McKnight I,* the district court stated that reinstatement was not appropriate in this case because the relationship between McKnight and GM was acrimonious, and because McKnight preferred not to be reinstated in his former position, but in a corporate finance or banking position. Reinstatement was also inappropriate, it found, because

> It is clear that in the instant case the plaintiff has been fully compensated and thereby made whole by the award of compensatory damages, and the defendant has bene properly punished by the award of punitive damages. Complete justice requires no more in the context of the remedial purpose of Title VII.

705 F.Supp. at 469. Based on this language, we found that "the district judge declined to order [reinstatement] because the relationship between McKnight and GM had been poisoned by this litigation and also because the award of $500,000 in punitive damages, on top of the compensatory damages awarded, was remedy enough." *McKnight II*, 908 F.2d at 115.

Because we struck the punitive and compensatory damages, we ordered the district court to reconsider its refusal to order McKnight's reinstatement, or in lieu thereof, to award front pay. Contrary to McKnight's present contention however, we did not order the court to reopen the record and gather new evidence on McKnight's employment status. Our opinion was silent as to whether the record should be supplemented. That decision, together with the decision on the

merits, was left to the sound discretion of the trial judge. "A discretionary order will only be set aside if it is clear that no reasonable person could concur in the trial court's assessment." *Tennes v. Commonwealth,* 944 F.2d 372, 381 (7th Cir. 1991). "The district court's decision must strike us as fundamentally wrong for an abuse of discretion to occur." *Anderson v. United Parcel Service,* 915 F.2d 313, 315 (7th Cir. 1990).

The district judge declined to reopen the record for several reasons. He noted correctly that our opinion did not require it. *McKnight III,* 768 F.Supp. at 678. He also explained that Patterson did not alter the remedies available under Title VII. Finally, he noted that McKnight had a full opportunity at trial to present evidence of his past and future damages and had failed to provide any authority for his position that the district judge was required to reopen the record on remand.

McKnight's reliance on *Grafenhain v. Pabst Brewing Co.*, 870 F.2d 1998, 1201 (7th Cir. 1989) and *Welborn v.*

Reynolds Metals Co., 868 F.2d 389 (11th Cir. 1989), for the proposition that the district court was required to reopen the record because of our remand, is misplaced. A district court's duties on remand are governed by the opinion ordering it. As Black's dictionary defines it (and as we used the term in *McKnight II*), "reconsideration implies reexamination, and possibly a different decision by the entity that initially decided it." Black's Law Dictionary 1272 (6th ed. 1990). Although the district court in *Grafenhain*, reopened the record to determine the amount of front pay, as GM points out, it only did so after it determined based upon the trial record that front pay was appropriate. *Id.* at 1202. This is an important distinction -- in *Grafenhain*, the amount of the award was determined in light of a reduction-in-force instituted by the defendant shortly after the plaintiff was wrongly discharged. Because the court found that the plaintiff would have lost his

job for legitimate reasons during the RIF, it awarded front pay only for the period between the plaintiff's termination and the RIF. *Id.*

Similarly, in *Welborn,* the Eleventh Circuit reversed the district court's judgment that the plaintiff had failed to establish a *prima facie* case of discrimination. 810 F.2d 1026, 1028 (11th Cir. 1987). It remanded the case, and the district court reinstated the plaintiff but awarded back pay of only $1.00 because it found the plaintiff failed to present sufficient evidence at trial to support a larger award. The district court declined to receive additional evidence on back pay, either relating to the pre-trial or post-trial period. *Welborn,* 868 F.2d at 391. The Eleventh Circuit held that the district court could refuse to hear further evidence relating to the pre-trial period, but that it abused its discretion in refusing to hear evidence supporting a back-pay award from the time of trial until the plaintiff's reinstatement. *Id.* The court explained that there was no way for the plaintiff to present evidence at trial of her

post-trial back-pay damages. Because Title VII is designed to make victims of discrimination whole, claimants are generally entitled to back pay from the date of the adverse employment action until reinstatement. Thus, the plaintiff should have been allowed to present evidence for the post-trial period. *Id.* at 391. The court also held that the plaintiff should have been allowed to present evidence on her reinstatement status. *Id.* But these rulings governed a proceeding where the appellate court reversed the trial court's judgment in favor of the defendant, and imposed liability. Because of its earlier judgment, the trial court in *Welborn* never evaluated the amount of back pay to which the plaintiff was entitled or to what position she should be reinstated. On remand, then, the court was required to evaluate what damages would make the plaintiff whole at the time the damages were awarded.

In this case, our remand was not based upon a reversal of the district court's evaluation of the facts at trial. Rather, because we vacated the §1981 damages and questioned the

completeness of the district court's explanation of its decision to deny reinstatement, we asked the district court to reconsider whether McKnight needed to be reinstated or given front pay to be made whole. This ruling did not require the district court to reopen the record, and we do not believe the court abused its discretion in refusing to do so.

Reinstatement & Front Pay

As to the merits of the district court's refusal to reinstate McKnight, or to award front pay, we again note that this decision is consigned to the sound discretion of the district court. *Tennes v. Commonwealth,* 944 F.2d 372 (7th Cir. 1991);[1] *Grafenhain v. Pabst Brewing Co.,* 870 F.2d 1998,

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[1]When we evaluate the relief awarded by the district court, we may look to both Title VII and ADEA (Age Discrimination in Employment Act) cases. As we pointed out in *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.,* 665 F.2d 149, 162 n.19 (7th Cir. 1981), although Title VII and ADEA cases are "not necessarily automatically interchangeable in establishing the existence of discrimination, both Title VII and ADEA vest trial courts with a similar broad discretion in awarding such legal or equitable relief as the courts deem appropriate." *Id.*

1201 (7th Cir. 1989). "Under an abuse of discretion standard, the property inquiry is not how the reviewing court would have ruled if it had been considering the case in the first place, but rather whether any reasonable person could agree with the district court." *Id.* at 1201; *see also EEOC v. Gurnee Inn Corp.*, 914 F.2d 815 (7th Cir. 1990).

> Although reinstatement is usually the preferred remedy, reinstatement is not always required. The decision regarding reinstatement is within the discretion of the district court, and several factors may persuade the district judge after careful consideration in a particular case that the preferred remedy of reinstatement is not possible or is inappropriate.

Coston v. Plitt Theaters, Inc., 831 F.2d 1321, 1330 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007, *vacated on other grounds*, 486 U.S. 1020, *on remand*, 860 F.2d 834 (7th Cir. 1988). In *Coston*, the two factors relied upon by the district court were hostility which it believed made reinstatement futile, and the

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(comparing 42 U.S.C. §2000e-5(g)(1976) with 29 U.S.C. §626(b)(1976).

lack of an available position for plaintiff. 831 F.2d at 1330. We also noted that genuine employer dissatisfaction with an employee's job performance is another factor for a court to consider in its determination whether reinstatement is appropriate. *Id.* at 1332. Nevertheless, we stated that we are "cognizant of the legitimate concern that the hostility common to litigation not become an excuse to avoid ordering reinstatement on a general basis . . . ." *Id.* at 1330. In *Tennes,* we affirmed the court's refusal to reinstate because we found the district court's determination that "there is no reason to believe the parties would enjoy a productive and amicable working relationship," and that the plaintiff "would not enjoy to confidence or respect of current management" was reasonable. *Tennes,* 944 F.2d at 381. The district court also declined to award front pay in part because the amount would be "too speculative" due to a high turn-over rate for other employees and because of the plaintiff's weak employment history in general and with the employer in particular. *Id.*

The jury refused to award McKnight damages for "loss of future earning capacity" caused by GM's discrimination. *See* Special Verdict at 2, Rec. Doc. 83. A jury's verdict, when §1981 and Title VII claims are tried simultaneously, binds the judge on factual issues common to both claims. *Daniels v. Pipefitters Association,* 945 F.2d 906, 923 (7th Cir. 1991)(citing cases), *cert. denied,* 112 S.Ct. 1514 (1992). Therefore, we believe the trial judge was bound by the jury's determination that McKnight suffered no impairment of his future earning ability. Damages for impaired future earning capacity are generally awarded in tort suits when a plaintiff's physical injuries diminish his earning power. *See, e.g., Johnson v. Director,* 911 F.2d 247 (9th Cir. 1990)(worker's compensation), *cert. denied sub nom., Todd Pacific Shipyards Corp. v. Director,* 111 S.Ct. 1582 (1991); *Gorniak v. National Railroad Passenger Corp.,* 889 F.2d 481 (3d Cir. 1989)(FELA suit by railroad employee). We have also affirmed loss of earning capacity awards in employment discrimination cases.

See Morales v. Cadena, 825 F.2d 1095, 1100 (7th Cir. 1987)(affirming award based on jury's consideration of plaintiff's emotional turmoil, depression, and career disruption). To recover for lost earning capacity, a plaintiff must produce "competent evidence suggesting that his injuries have narrowed the range of economic opportunities available to him. . . .[A] plaintiff must show that his injury has caused a diminution in his ability to earn a living." *Gorniak*, 889 F.2d at 484. Thus, the jury determined that McKnight's ability to earn from the time of trial onward was not impaired.

The trial court held that reinstatement was not appropriate because McKnight asked for a "completely different job and to be relocated in a new city." *McKnight III*, 768 F.Supp. at 679. The court found no basis to conclude that McKnight is qualified to perform the job he requests or that there is a position available. *Id.* at 680. Moreover, because McKnight's career goals have changed, the district court did not believe Title VII's purposes would be served by putting

McKnight in a job "he does not want." *Id.* McKnight challenges this factual finding, and argues that the court should have considered his present "desperate" financial condition. The court noted the possibility that McKnight requests reinstatement to force GM to buy him out. As we pointed out, such motivation is a valid reason for denial. *McKnight II*, 908 F.2d at 116. Finally, the court stated that the compensatory and punitive awards did not influence his initial decision not to reinstate McKnight given the change in career goals McKnight presented at trial. The court also repeated his concerns about the acrimonious relationship between the parties. *Id.* We cannot find that the district court abused his direction in basing his refusal to reinstate McKnight on these factors.

McKnight relies on *Ellis v. Ringold School District*, 832 F.2d 27 (3d Cir. 1987), *cert. denied*, 494 U.S. 1005 (1990), to challenge one of the district court's reasons for declining to reinstate him. At trial, McKnight presented extensive evidence that after his discharge, he changed his

career and became a stockbroker. *McKnight I*, 705 F.Supp. at 469. Moreover, in his post-trial motion for reinstatement, McKnight stated that he preferred to be reinstated to a position as a corporate finance portfolio manager or analyst in GM's New York office. *See* Plaintiff's Reply Brief in Support of his Post-Verdict Motion for Reinstatement, Rec. Doc. 92, at 3-4. As we have noted, when the district court reconsidered McKnight's reinstatement, it relied in part upon this career change to refuse to reinstate McKnight to his position as a manufacturing supervisor. *McKnight III*, 768 F.Supp. at 680. The court also expressed concern over McKnight's ability to assume a position managing GM's corporate finances. *Id.*

In *Ellis*, after her discharge the plaintiff, a school teacher, worked for higher pay in a munitions factory for two years, then taught for a semester at a private school, and finally took a job as a janitor. 832 F.2d at 29. The district court did not discuss the plaintiff's request for reinstatement in its order, and the defendant argued on appeal that the

plaintiff's decision to work in industry meant that she was not entitled to reinstatement as a teacher. *Id.* at 30. The Third Circuit noted that this "argument would have greater force if, in fact, the court had denied reinstatement." *Id.* Moreover, the court explained that "[s]tanding alone, the fact that a plaintiff takes a job in an unrelated field to meet her obligation of mitigation should not be construed as a voluntary withdrawal from her former profession." *Id.* The plaintiff asked to be reinstated to her former position as a teacher, which distinguishes *Ellis* from the situation in the case at bar.

Further, in this case, the district court did consider and deny McKnight's request for reinstatement, and McKnight did more than take a job in an unrelated field. He testified at trial that he had become a stockbroker, and in his post-trial pleadings requesting reinstatement, expressed a preference for a job in his new field. The district court denied front pay on remand in part because the jobs McKnight held after his discharge from GM paid more. *See* 768 F.Supp. at 680; *see*

also discussion of McKnight's post-GM employment history, *infra* at 10.

Damages in employment discrimination cases are not intended to insure a plaintiff's future financial success. "Damages should ordinarily extend only to the date upon which 'the sting' of any discriminatory conduct has ended." *Smith v. Great American Restaurants, Inc.*, Nos. 91-1793 & 19-1864, 1992 U.S. App. LEXIS 16821, at *23 (7th Cir. July 24, 1992)(quoting *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 160 n.14 (7th Cir. 1981). In fact, in *Syvock*, we approved the district court's determination that

> A proper cutoff time for a damage assessment in this case should be the day when the wounds of discrimination should have healed. In this case it is certain that the sting of any discriminatory conduct ended, or should have ended, substantially in advance of the date the trial on damages commenced.

665F.2d at 160 n.14. McKnight presented himself to the jury as a successful stockbroker, and at the time of trial he was employed as a broker by Gruntol Corporation. Gruntol paid

McKnight $12,840 in wages between April and August 1988. *See* Trial Transcript ("Tr. Trans."), Vol. IV-B at 48-49. McKnight kept this job until December of 1988. Affidavit of Gary McKnight, Rec. Doc. 146, at 1. Before he worked for Gruntol, McKnight told the jury that he worked as a broker for another company, Oppenheimer & Co., for approximately a year and a half. He earned about $54,000 from Oppenheimer in 1987. Tr. Trans. Vol. IV-B at 41. While he worked at GM, McKnight earned $32,000 a year. *McKnight I,* 708 F. Supp. at 468.

Based on this evidence, the court could have found that the sting of discrimination had ended by the time of trial. In any event, the jury did find that McKnight's future earning ability was not impaired. The district court also looked to this evidence when he denied reinstatement and front pay. He explained that "it is arguable that Mr. McKnight presented a 'success' story to the jury -- electing to impress the jurors with his entitlement to large damages, both compensatory and

punitive. He now would reverse his field and seek to demonstrate his impoverished condition at a reopened trial." *McKnight III*, 768 F.Supp. at 682. Here, through reinstatement or a front pay award, McKnight appears to be attempting to force GM to insure his future employment success. At trial he presented evidence that he had made a successful career change. Now, he presents evidence that he has had trouble keeping jobs since then. McKnight Affidavit, Rec. Doc. 146, at 1-2. Nevertheless, as we have explained, "you cannot just leave the labor force after being wrongfully discharged, in the hope of someday being made by a judgment at law." *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1426 (7th Cir. 1986). McKnight's plea for help from his "desperate" financial decision does make us question whether he expects GM to ensure his future employment success. *See* Brief in Support of Plaintiff's Motion for Reconsideration, Rec. Doc. 145, and McKnight Affidavit, Rec. Doc. 146.

We also note that when a party fails to provide the

district court with the essential data necessary to calculate a reasonably certain front pay award, the court may deny the front pay request. *Coston,* 831 F.2d at 1335, & n.6. Such information includes the amount of the proposed award, the length of time the plaintiff expects to work for the defendant, and the applicable discount rate. *Id.* Moreover, front pay awards, while often speculative, cannot be unduly so. The longer a proposed front pay period, the more speculative the damages become. *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056 (7th Cir. 1990). Here, McKnight provides no basis for calculating an appropriate award, even for the picture of his employment history he presented at trial. The district court invited the parties to file written memoranda further addressing the issues of reinstatement and front pay at a status conference held shortly after our remand. *See* May 16, 1991 Transcript at 4-5. Both parties declined. McKnight's motion for reconsideration also lacks the data the district court needed to calculate front pay.

Given the speculative nature of front pay in this case, together with McKnight's trial strategy and post-discharge employment history, we do not believe the district court abused its discretion in declining to order his reinstatement or to award front pay.

Prejudgment Interest

McKnight also challenges the district court's refusal to order GM to pay prejudgment interest on his back pay award. "An award of prejudgment interest lies within the discretion of the trial court." *Kossman v. Calumet County,* 800 F.2d 697, 702 (7th Cir. 1986), *cert. denied,* 479 U.S. 1088 (1987), *appeal after remand,* 849 F.2d 1027 (1988). In more recent cases, we have cabined that discretion somewhat. "The time has come, we think, to generalize, and to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations." *Gorenstein Enterprises v. Quality Care-USA,* 874 F.2d 431, 436 (7th Cir. 1989). "Title

VII authorizes prejudgment interest as part of the backpay remedy in suits against private employers." *Loeffler v. Frank*, 486 U.S. 549, 557 (1988). "Indeed, the Supreme Court has said that it is a 'normal incident' of relief in Title VII suits." *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 819 (7th Cir. 1990)(quoting *Loeffler*, 486 U.S. at 558.). Nevertheless, in *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989), we refused to grant a plaintiff's request for prejudgment interest because the plaintiff never presented the issue to the district court and raised it for the first time on appeal. We held that "at a minimum, a party must request the interest in a post-trial motion if he or she has failed to plead the relief in the original complaint." *Brooms*, 881 F.2d at 424 n.9 (citing *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1298 (7th Cir. 1987).

Here McKnight did not ask for prejudgment interest until after we remanded the case and the district court entered its decision and order on remand on July 15, 1991. *See*

Plaintiff's Motion for Order Requiring Payment of Partial Post-Judgment Interest and Pre-Judgment Interest, dated August 1, 1991, Rec. Doc. 147. This request came almost three years after the district court entered its first judgment, and much later than the plaintiff's request in *Brooms*. McKnight provides no explanation for his tardy motion. This case is clearly distinguishable from *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1298 (7th Cir. 1987), where the plaintiff only waited until after the judgment was entered to ask for prejudgment interest. Here, McKnight waited through the district court's first entry of judgment, the appeal to his court, the remand, and entry of a second judgment before asking for interest. This is simply too long. *Brooms*, 881 F.2d at 424. Therefore, we find that the district court correctly denied as untimely McKnight's request for prejudgment interest.

Attorneys' Fees

GM asks us to set aside the attorneys' fees award

entered by the district court. The parties stipulated to the amount of fees prior to the first appeal in this case, and the district court's judgment is based on this stipulation. The district court was entitled to hold GM to the stipulation, absent "manifest injustice" to the parties. *See Grafenhain,* 870 F.2d at 1206; *see also Cates v. Morgan Portable Building Corp.*, 780 F.2d 683, 690-91 (7th Cir. 1985)("Although stipulations are to be encouraged in order to economize on the costs of litigation, a judge has the power to relieve a party from a stipulation when it is reasonable to do so . . ."). The stipulation contemplated the possibility that the judgment might be modified on appeal. *See* Stipulation Regarding Attorneys' Fees, Rec. Doc. 104, at 2. Moreover, GM is a sophisticated litigant, and was represented by experienced counsel during the negotiation and entry of the stipulation. We do not believe the district court abused its discretion when it refused to relieve GM of the stipulation. Moreover, the district court determined that the fee award was "entirely reasonable" because the Title

VII and §1981 claims involved common facts. *McKnight III*, 768 F.Supp. at 681. Although we have ordered courts to reduce attorneys' fees awards in cases where §1981 awards have been vacated, *Brooms*, 881 F.2d at 412; *Coston v. Plitt Theaters, Inc.*, 860 F.2d 834 (7th Cir. 1988), appellate review of an attorneys' fees award is very limited. *Kossman v. Calumet County*, 849 F.2d 1027, 1030 (7th Cir. 1988). The district court's holding falls within its sound discretion, and we decline to disturb it.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GARY McKNIGHT,

Plaintiff,

v. Case No. 87-C-248

GENERAL MOTORS CORPORATION,

Defendant.

DECISION AND ORDER ON REMAND

In 1988, Gary McKnight prevailed on his claim that the defendant, General Motors Corporation, unlawfully discharged him from his employment because of his race and in retaliation for his prior complaints of race discrimination. Mr. McKnight pressed his case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and 42 U.S.C. §1981, which is based on the Civil Rights Act of 1866. A jury heard his §1981 claim, and this court resolved the Title VII dispute.

Judgment was entered in the plaintiff's favor in the amount of $610,000.00, plus attorney's fees. Specifically, the jury awarded $55,000.00 in back pay, another $55,000.00 for emotional distress, and $500,000.00 as punitive damages.

This court denied Mr. McKnight's post-trial motion for reinstatement to his former position as a manufacturing supervisor and his alternative request for reinstatement to a different job in a different location but still within the General Motors Corporation. *McKnight v. General Motors Corp.*, 705 F.Supp. 464 (E.D. Wis. 1989). The defendant appealed the judgment except for the award of attorney's fees, and the plaintiff appealed that portion of the judgment denying reinstatement.

During the pendency of the appeal, the United States Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989), which holds that §1981 was limited to providing redress for unlawful discrimination in the "making and enforcement of private contracts," and specifically held

that §1981 afforded no relief from "problems that may arise later from the conditions of continuing employment."

On appeal, the court of appeals for the seventh circuit decided that *Patterson* should be applied retroactively. *McKnight v. General Motors Corp.*, 908 F.2d 104, 110-11 (7th Cir. 1990). The court of appeals directed me to dismiss Mr. McKnight's §1981 claims. The court also remanded "for reconsideration of his entitlement to reinstatement (or in lieu thereof to front pay) under Title VII." *Id.* at 117.

The first issue raised here by the parties is the scope of consideration on remand. The defendant urges that the reconsideration is limited to the record as it stands; the plaintiff argues that the court should reopen the record to receive additional evidentiary submissions on the questions of reinstatement and front pay.

The instructions from the court of appeals do not expressly or impliedly call for additional evidence. The court's instructions are "to reexamine the issue of reinstatement

in light of [the vacation of the punitive damage award] and also in light of our discussion in the preceding paragraph of the circumstances in which denial of reinstatement is appropriate." *McKnight,* 908 F.2d at 116. The court also stated that "on remand the district court may wish to consider not only whether McKnight should be reinstated but also whether, if not, he can and should receive front pay in lieu of reinstatement." *Id.* at 117.

Mr. McKnight argues that the change in the law occasioned by the *Patterson* decision had "obvious corresponding impacts on matters litigated in this case." Plaintiff's brief in opposition at p. 2. *Patterson* in no way changed the remedies available under Title VII. Reinstatement and front pay were available when the case was tried and still remain possible remedies under Title VII. I also reject the plaintiff's contention that his current employment situation must be explored in order to resolve the remanded matters. The record was fully established as of the end of the trial,

unless there exists a contrary instruction from the appellate court. I cannot find such an instruction in the court of appeals' ruling. Mr. McKnight made his record regarding damages, both past and future, during the trial, and he submitted his case regarding reinstatement in post-trial briefs.

A status conference was held in open court on May 16, 1991. At that time, I heard the parties' positions as to the remanded issues and inquired of the parties whether they wanted to file written memoranda further addressing the issues of reinstatement and front pay. Surprisingly, both sides declined. The defendant did ask for and did receive an opportunity to brief the issue of attorneys' fees. The briefs on that one issue have been filed, and the issues remanded by the court of appeals are now ripe for review.

With reference to "the record" in this case, I am constrained to observe that the court of appeals addressed a matter of "trial error" that it acknowledged was not a part of the record. Indeed, it was a matter that the court of appeals

expressly recognized was not preserved for appeal and had been waived. Nevertheless, the panel concluded that because of the time limitations which I set, the defendant's witnesses actually "ran" to and from the witness stand. This, the court of appeals stated, created a "spectacle" and a "relay race." It was "unseemly", the court of appeals went on to note. *McKnight,* 908 F.2d at 115.

Unfortunately, in going *dehors* the record, the court of appeals unfairly relied on the partisan representation of General Motors' disappointed trial counsel, who prized client had suffered an adverse jury verdict of over $600,000. The appellate court's reliance was enhanced because Mr. McKnight's counsel understandably did not contradict the representation. Why, I ask, should plaintiff's counsel expend his valuable, *restricted* time to respond to an issue that was not preserved for appeal? He had to address other issues -- ones based on the record -- before his red light went on.

I have been a judge of a court of record for 40 years. In no instance, including the *McKnight* case, has a witness ever entered my courtroom on the run or exited from the witness stand at such a pace in a matter over which I have presided. The "unseemly spectacle" described in Judge Posner's decision simply did not take place. There was no "relay race."

The court of appeals also asserted that my time limits were imposed "arbitrarily." My decision to set time limitations stemmed from the following circumstances: On March 5, 1987, this case was filed and was assigned to Judge Thomas J. Curran; he entered a scheduling order on July 20, 1987, in which he stated that the time necessary for trial was "a maximum of three days." Subsequently, the case was randomly reassigned to Judge J.P. Stadtmueller. When I then volunteered to handle it in place of Judge Stadtmueller, the case was about a year and a half old and, on its face, it was an uncomplicated employment discrimination case which should be tried in a maximum of three days.

I conducted a pretrial conference on August 8, 1988, and set the trial to start on October 3, 1988. However, as the two sides geared up for trial, I found that they were crossing swords at every turn. Representing General Motors, the defense team was playing hardball; Mr. McKnight's counsel was equally out for blood. During the rather short period between the pretrial conference and the start of the trial, the volume of filings in this case more than doubled. General Motors submitted an inordinately large number of *in limine* motions seeking to exclude testimony from various witnesses. For instance, in reference to the deposition of one witness alone, Jacob Johnson, the defendant asked me to resolve over 65 evidentiary objections in advance of trial. Five days before the trial date, the defendant filed a motion for reconsideration of Judge Curran's denial of its motion for summary judgment. His decision on the original motion had been entered on May 12, 1988.

Being unable to agree on the questions to be included in a special verdict, counsel filed widely divergent proposals. They also vigorously disagreed on their proposed substantive jury instructions and submitted separate ones. There were 105 exhibits to be offered in evidence, and pretrial objections were advanced as to most of them.

As the trial date neared, I became increasingly aware of the extraordinary combativeness of counsel. I was firmly convinced that they were turning an acorn into an oak tree right before my eyes. It was my studied opinion that this case could fairly be tried in one week; it would needlessly have taken far longer than that if counsel had a free rein. After discussing this problem with counsel, I set the time limits. No objections were heard. The time limitations were calmly and deliberately set to meet a clearly demonstrated need; they were not "arbitrarily" imposed. I was fully mindful of the admonitions in *Flaminio v. Honda Motor Co., Ltd.*, 733 F2d 463 (1964) in setting the time restrictions in advance of the

trial and in keeping them flexible as the trial progressed. It is regrettable that the court of appeals elected to buy the version of how this trial was conducted that was sold by General Motors' lawyer. With that said, I turn to the issues at hand.

I. REINSTATEMENT

The Title VII remedies in a particular case are to be fashioned in such a way as to return the victim of discrimination to the position he would have been in but for the illegal behavior. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975). Reinstatement is not a tool to be used by an individual to fulfill his, as yet, unmet employment goals.

The court is to exercise its discretion so as to remedy the discrimination suffered by Mr. McKnight. One such potential remedy is reinstating Mr. McKnight to his former position. This remedy is in keeping with *Albermarle*.

However, the remedy sought by Mr. McKnight is to be placed within General Motors in an entirely different job and to be relocated to a new city; that is his clear preference.

"A hiring order is not appropriate unless the person discriminated against is presently qualified to assume the position sought." *Kamberos v. GTE Automatic Electric, Inc.*, 603 F.2d 598, 603 (7th Cir. 1979)(*citing Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976)). Likewise, reinstatement is not warranted where the position sought is no longer available. *Gaddy v. Abex Corp.*, 884 F.2d 312, 319 (7th Cir. 1989). The case at bar does not involve a discriminatory failure to hire or a discriminatory firing disguised as an elimination of position or a reduction in force. However, the underlying policy is still the same: reinstatement must be feasible. There is no basis to find that Mr. McKnight is presently qualified to assume his preferred position in "corporate finance or investment banking" or that General Motors has such a position available.

The court of appeals' decision surmised that the plaintiff's desire to be reinstated might be motivated by his wish to be bought out. *McKnight,* 980 F.2d at 116. This is not beyond the realm of possibility, especially in light of Mr. McKnight's changed career goals. Given Mr. McKnight's unequivocal desire to be in an entirely different field, reinstatement to his former position is not desirable or realistic.

Mr. McKnight could be reinstated to his former position as a manufacturing supervisor. Would the purposes of Title VII be advanced by such an order? I think not. Mr. McKnight's career goals and aspirations, as presented by his testimony at trial and through his experts, no longer include supervising the manufacture of automobile parts. He wants to be in the financial services industry. Title VII would not be served by placing the plaintiff in a job he does not want. Such a situation would likely cause Mr. McKnight to suffer again

from emotional distress. This type of reaction "would ensue independently of any hostility or retaliation by the employer." *Id.*

I am directed to reexamine the issue of reinstatement in light of the fact that the punitive damage award and the compensatory damage award have been vacated. I do not believe that those circumstances change the equation. As stated in the original decision, a primary consideration in denying reinstatement was Mr. McKnight's express desire to work in another field. In ruling on the motions after judgment, I stated in the opinion published at 705 F.Supp. at 469:]

> After balancing all the equities, I am convinced that reinstatement in this case would not advance the purposes of Title VII. The plaintiff asserts that he prefers not to be reinstated in his former position of manufacturing supervisor but rather in a position concerned with corporate finance or investment banking. Further, the evidence at trial established that the plaintiff has changed his career goal from manufacturing management to being a stockbroker. I conclude that the plaintiff does not have a primary interest in the position that he formerly held.

That aspect of the case has not been altered by my reconsideration of the issue on this remand. The matters of compensatory and punitive damages awarded for his §1981 claim, as well as the "acrimonious" employer-employee relationship, were viewed as lesser considerations; I still view them as such.

II. FRONT PAY

Is front pay an available remedy under Title VII? Yes. *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1528 (11th Cir. 1991); *Carter v. Sedgwick County, Kansas*, 929 F.2d 1501, 1505 (10th Cir. 1991); *Edwards v. Occidental Chemical Corp.*, 892 F.2d 1442, 1449 (9th Cir. 1990); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985). This list, while certainly not exhaustive, is representative of the jurisdictions which hold that front pay is available under Title VII when reinstatement is denied.

Is an award of front pay appropriate in the case at bar? No. Mr. McKnight presented evidence to the jury regarding his employment future. The jury reasonably found that Mr. McKnight did not lose future earnings as a result of the discrimination he suffered at the hands of the defendant. Mr. McKnight earned considerably more money after his termination from General Motors. I am persuaded that Mr. McKnight's employment opportunities were not and are not inferior to his employment at General Motors.

III. ATTORNEY'S FEES

After the resolution of the post-trial motions, but before the issuance of the appellate mandate, the parties entered into a stipulation regarding the plaintiff's attorney's fees and costs. Pursuant to that stipulation, this court entered an order amending the judgment to add an award of $57,125.70 as

attorney's fees and costs. Although the defendant did not appeal this aspect of the judgment, it now seeks to have the attorney's fee award reduced.

I do not consider it appropriate to revisit the attorney's fees award. The United States Supreme Court has stated:

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

In re *Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

A lower court may decide matters left open by the mandate. *Id.* However, the issue of attorney's fees was not left open by the mandate of the court of appeals. How could it have been left open when the issue was not raised on appeal?

Even if I revisited the issue of attorney's fees, I would

not disturb the stipulation previously entered by the parties. The amount of attorney's fees and costs was entirely reasonable. This is a case in which the Title VII and §1981 claims "involve a common core of facts," and the theories cannot be viewed as a series of "discrete claims." *Graham v. Sauk Prairie Police Commission,* 915 F.2d 1085, 1109 (7th Cir. 1990). Therefore, the "fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.*

Plaintiff's counsel is requested to prepare an appropriate judgment and to submit it to the court after first providing defendant's counsel with a copy.

Therefore, IT IS ORDERED that upon remand from the court of appeals for the seventh circuit, Mr. McKnight's claims under 42 U.S.C. §1981 be and hereby are dismissed.

IT IS ALSO ORDERED that the defendant, General Motors', motion to limit the scope of reconsideration upon remand to the trial record be and hereby is granted.

IT IS FURTHER ORDERED that after reconsideration, Mr. McKnight's request for reinstatement to a position within the defendant corporation, General Motors, be and hereby is denied.

IT IS FURTHER ORDERED that Mr. McKnight's request for front pay in lieu of reinstatement be and hereby is denied.

IT IS FURTHER ORDERED that the defendant's motion to reduce the award of plaintiff's attorney's fees be and hereby is denied.

IT IS FURTHER ORDERED that each party shall bear its own costs in connection with this order on remand. No additional attorney's fees will be granted in connection with this order on remand.

Dated at Milwaukee, Wisconsin, this _____ day of July, 1991.

_____
Senior U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GARY McKNIGHT,

Plaintiff,

v. Case No. 87-C-0248

GENERAL MOTORS CORPORATION,

Defendant.

DECISION AND ORDER

Commencing on October 3, 1988, a jury trial was held on the plaintiff's claims, pursuant to 42 U.S.C. §1981 and Title VII, that the defendant unlawfully discharged him from his employment at A.C. Sparkplug because of his race and in retaliation for his prior complaints of race discrimination. The jury returned a verdict in favor of the plaintiff on both the

discrimination claim and the retaliation claim. The jury awarded $110,000 in compensatory damages and $500,000 in punitive damages.

The defendant has now filed motions after verdict seeking: (a) a judgment notwithstanding the verdict; or in the alternative, (b) an order amending the judgment to strike the award of punitive damages and reduce the amount of the compensatory damages; and (c) a new trial on various grounds. The plaintiff has filed a post verdict motion to amend the judgment to provide for his reinstatement to his prior job or to a comparable position. For reasons stated herein, the defendant's several motions will be denied, as will the plaintiff's motion for reinstatement.

Motions for a judgment notwithstanding the verdict are to be weighed by the following legal standard:

> Such a motion should be denied "where the evidence, along with inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial

> exercise of their judgment may reach different conclusions." *Smith v. J.C. Penney Company*, 7 Cir., 1958, 261 F.2d 218, 219.

Rakovich v. Wade, No. 85-1529 and 85-1530, *slip op.* at 12 (7th Cir. June 8, 1988)(en banc)(quoting *Valdes v. Karoll's, Inc.*, 277 F.2d 637, 638 (7th Cir. 1960).

In deciding whether the evidence is sufficient to satisfy this standard, the district court is not to weigh the evidence or judge the credibility of the witnesses nor substitute its own judgment of the facts for that of the jury. *Rakovich, supra,* at 12-13. The district court, however, should consider whether the evidence to support the verdict is substantial; "a mere scintilla of evidence will not suffice." *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984).

I find that there was ample credible evidence to support the jury's findings that the defendant discriminated against the plaintiff on the basis of his race, and also, that it retaliated against him for having filed complaints alleging race discrimination. Similarly, there was sufficient evidence to

warrant the jury's finding that the defendant took these actions in a malicious, wanton or oppressive manner.

The order of proof in a case such as this is set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973), and in *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1980). Under the prescribed model of proof, the plaintiff must first establish a prima facie case. To do this the plaintiff must (1) prove that he is a member of a protected class, (2) prove that he was discharged, and (3) produce sufficient evidence of disparate treatment that the court can infer a causal connection between his protected class membership and the discharge. Similarly, in order to establish a prima facie case of retaliation, the plaintiff must show that: "(1) he has engaged in statutorily protected activity; (2) that the employer has taken adverse employment action; and (3) a causal connection exists between the two." *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600 (11th Cir. 1986).

The prima facie case serves the function of eliminating the most common non-discriminatory reasons for the employer's adverse action against the plaintiff, giving rise to a legally mandatory presumption of intent to discriminate on a prohibited basis. *Burdine, supra*, 450 U.S. at 254 n.7. The burden then shifts to the employer to rebut the presumption by articulating a legitimate, nondiscriminatory reason for the discharge. *Id.* The burden then shifts back to the plaintiff to prove that the articulated reason is pretextual. This may be accomplished directly by persuading the trier of fact "that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra,* 450 U.S. at 256. If the articulated reason is shown to be pretextual, then the initial presumption is in effect resurrected and stands unrebutted.

In *McDonnell Douglas,* the Supreme Court held that in an individual race discrimination case, the employee may focus

on employment patterns broader than his own individual case to prove pretext. *Id.* at 804-05. An employer's deviation from normal patterns and practices, *the subjectivity* of the employment evaluation system relied upon by the employer and the racial attitudes of the supervisors in question are generally considered relevant in this regard. *Id.*; *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir. 1986).

In *Burdine* the Supreme Court recognized the significance of credibility judgments by the trier of fact by noting that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation" and that "this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Id.* at 255 n.10. Whether the proffered non-discriminatory reason is pretextual may turn on the jury's judgment as to the credibility of the witnesses "because almost every worker has

some deficiency on which the employer can plausibly blame the worker's troubles." *Hunter, supra,* 797 F.2d at 1423.

The defendant argues that Mr. McKnight was fired because he did not meet the employer's legitimate job performance expectations. G.M. presented the testimony of numerous management personnel who held supervisory responsibilities over the plaintiff, along with the results of various personnel appraisals that evaluated the plaintiff in a negative manner. G.M. argues that the volume of this evidence was "overwhelming" and that Mr. McKnight did not provide a scintilla of evidence to prove that the allegations of employment performance deficiencies were pretextual. On the contrary, I find that the jury was presented with substantial evidence, which, if believed, would show that the defendant's proffered explanation of poor job performance was pretextual.

First, the jury received the testimony of the plaintiff's expert on personnel practices. Dr. Dresang opined that the subjectivity of G.M.'s employee appraisal system is such that

it does not provide reliable evidence of poor performance. Second, the motives of a number of the defendant's witnesses who had supervisory responsibility for the plaintiff were effectively impeached. Some examples: one of the plaintiff's supervisors told racial jokes, using the word "nigger"; one of the plaintiff's supervisors was coerced into reducing an evaluation of Mr. McKnight's work performance; a former manufacturing superintendent provided an affidavit to the effect that the plaintiff's immediate supervisor wanted to terminate the plaintiff's employment for reasons unrelated to his job performance; and several black employees testified that they were concerned about how black employees were treated by Mr. McKnight's immediate supervisor. Third, assuming the validity of the defendant's negative appraisal of the plaintiff's job performance, there was evidence that the plaintiff was treated differently than others with similar performance problems.

Substantial evidence was offered by Mr. McKnight in support of his claim of retaliation. For example, Thomas Cassini admitted that the plaintiff's past litigation against the company was discussed in the meeting at which it was decided to fire the plaintiff; the plaintiff's immediate supervisor was told that he "must" document everything about the plaintiff because of the pending litigation; Mr. McKnight was referred to by a supervisor as a "hot potato" because of his litigation; there was evidence that supervisory personnel were upset with the plaintiff because he had filed complaints against the company; there was evidence that the plaintiff's assignment to "line 6" was retaliatory and designed to pave the way for his termination; and there was evidence that a supervisor repeatedly asked Mr. McKnight to sign a release for his complaint against the company and that this supervisor told him that his career at G.M. would be damaged if he did not sign.

The foregoing examples, along with other similar evidence offered at trial, are sufficient when viewed in the light most favorable to the plaintiff to have enabled the jury to reach the conclusion that the explanation offered by the defendant was pretextual. The findings of fact of the jury will not be disturbed.

The defendant's motion for a new trial is based on the following grounds: (a) that the jury's verdict is contrary to the great weight of the evidence; (b) that the defendant was denied a fair trial because of erroneous evidentiary rulings, the imposition of time constraints by the court, and alleged misconduct by the plaintiff's counsel; and (c) that the size of the damage award evinces bias and passion on the part of the jury which necessarily must have infected its determinations as to liability.

The authority to grant a new trial generally rests within the trial court's discretion. *Allied Chemical Corp. v. Diaflon, Inc.*, 449 U.S. 33, 36 (1980). A new trial is warranted if the

verdict is contrary to the clear weight of the evidence, if the damages award is excessive, or if the trial was not fair to the moving party. *General Foam Fabricators, Inc. v. Tenneco Chemicals, Inc.*, 695 F.2d 281, 288 (7th Cir. 1982).

The defendant's allegations of misconduct by the plaintiff's attorney are singularly unfounded and merit no discussion.

The defendant lists fifteen evidentiary rulings by the court which it asserts were in error. The defendant wanted the court to limit the evidence to that which concerned the motives of only those management personnel directly involved in evaluating or supervising the plaintiff during the relevant time period. Such an evidentiary limitation is directly contrary to the approach reflected in *McDonnell Douglas* and would impose insurmountable evidentiary barriers on plaintiffs in this type of case. *See Hunter, supra,* 797 F.2d at 1423. I do not believe that the evidentiary rulings in this case prejudiced the defendant or justify a new trial.

The defendant argues that it was not given adequate time to present its case. At the pretrial conference both sides agreed that the trial would take no more than a week, and the court scheduled the case accordingly. Although this was not a complex case, it was tried with great zeal and competitiveness, and as the trial progressed it became very apparent that the presentation of proof was becoming unnecessarily prolonged. The allowable time provided to each side was then modified to accomplish the completion of the trial within the period originally contemplated; however, counsel were expressly informed that additional time would be afforded if the interests of justice required it. Indeed, at G.M.'s request its allowable time was in fact extended near the end of the trial. G.M. never made an offer of proof as to what evidence it was unable to introduce and failed to make an objection as to the time allocations. *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987). In my opinion, G.M. was afforded a full and adequate opportunity to present its case,

and my exercise of control over the length of the trial did not impinge on the defendants receiving a fair trial.

The jury's award of $55,000 for lost wages and fringe benefits was reasonable. The plaintiff earned wages of $32,000 for the eleven months that he worked for the defendant in 1983. After his discharge, Mr. McKnight earned $12,600 in 1984; $18,000 in 1985; $33,000 in 1986; $55,000 in 1987; and approximately $11,000 in 1988, up until the commencement of the trial. Accounting for lost benefits, projected salary increases and expenses incurred in commuting to Chicago in 1987, the $55,000 award was reasonable.

The jury's award of $55,000 for pain, suffering, and physical and emotional distress was also reasonable. A jury's assessment of damages for intangible harms such as humiliation and emotional distress is inherently subjective. I believe that the jury's judgment was amply supported by the evidence. The expert testimony of Dr. Lynch showed that the plaintiff suffered anxiety, sleep disorder, headaches and other

psychosomatic complaints associated with stress, along with a loss of self-esteem as a result of his termination. The plaintiff was under such stress that just prior to his discharge, he sought psychiatric counseling. Dr. Lynch also testified that the plaintiff suffered a greater degree of emotional distress as a result of his termination than did the typical victim of unjust termination; this was because of the degree of investment that the plaintiff had made in terms of time and commitment to the defendant. Under these circumstances, an award of $55,000 is consistent with past awards for emotional distress in race discrimination cases under §1981. *eg. Foster v. MCI Telecommunications Corp.*, 555 F.Supp. 330 (D.C. Colo. 1983) ($50,000); *Fisher v. Dillard University*, 499 F.Supp. 525 (E.D. La. 1980) ($50,000); *Williams v. Owens-Illinois, Inc.*, 25 F.E.P. Cases 1478 (N.D. Cal. 1979) ($50,000).

In my opinion, the jury's award of $500,000 for punitive damages is also reasonable. This is a case involving deliberate wrong doing by a wealthy defendant. There was

ample evidence to enable the jury to conclude that G.M. intentionally retaliated against the plaintiff. An award of punitive damages is appropriate to punish a wrongdoer for its outrageous conduct and to deter others from engaging in similar conduct. *Ramsely v. American Air Filter Co.*, 772 F.2d 1303, 1314 (7th Circ. 1985).

In order for an award to constitute meaningful punishment, the jury is permitted to take into account the size and wealth of the defendant. Simply because the amount necessary to constitute punishment and deterrence is sizable does not mean that the award of punitive damages is a windfall for the plaintiff. In that instant case, the award of punitive damages is not out of proportion to the amount of compensatory damages. It cannot be said that the amount of the award evidences that the jury was motivated by improper reasons, such as prejudice or caprice.

In his motion for reinstatement, Mr. McKnight argues that prevailing Title VII claimants are presumptively entitled to

reinstatement. *Donnellon v. Fruehauf*, 794 F.2d 598 (11th Cir. 1986). The remedial purposes of the act contemplate that, in order to make the plaintiff whole, reinstatement may be granted. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1974). In that case the Supreme Court explained:

> It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts "may" invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and -- owing to the structure of the federal judiciary -- these choices are, of course, left in the first instance to the district courts.

Although the district court's discretion is equitable in nature, its judgment must be guided by the purposes of Title VII. *Id.* The purposes of Title VII are prophylactic:

> [the purpose is] to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. [quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)] . . . It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is

> shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice."

Albermarle, supra, at 417-18.

After balancing all the equities, I am convinced that reinstatement in this case would not advance the purposes of Title VII. The plaintiff asserts that he prefers not to be reinstated in his former position of manufacturing supervisor but rather in a position concerned with corporate finance or investment banking. Further, the evidence at trial established that the plaintiff has changed his career goal from manufacturing management to being a stockbroker. I conclude that the plaintiff does not have a primary interest in the position that he formerly held. At trial it became evident that the relationship between the parties is acrimonious at best and given the management level position involved, reinstatement would probably be unproductive. It is clear that in the instant case the plaintiff has been fully compensated and thereby made

whole by the award of compensatory damages, and the defendant has been properly punished by the award of punitive damages. Complete justice requires no more in the context of the remedial purpose of Title VII.

Therefore, IT IS ORDERED that the defendant's motions after verdict be and hereby are denied.

IT IS ALSO ORDERED that the plaintiff's motion for reinstatement be and hereby is denied.

Dated at Milwaukee, Wisconsin this ____ day of January, 1989.

_____
Senior U.S. District Judge

APPENDIX E

Federal Employment Practice (FEP

Federal Employment Practices Cases Volumes 52 thru 54, 1990-1991 and Cummulative Digest.

Federal Employment Practice Cases Volumes 55 thru 57, 1991-1992 and Cummulative Digest.

APPENDIX F

Title VII, 42 U.S.C. §2000e-5

In Title VII, Congress has expressed an intention and provided that any person claiming to be aggrieved could bring suit under Title VII to challenge discriminatory employment practices. The legislative history indicates that Title VII was passed pursuant to the Commerce Clause of the Constitution. See *U.S. Constitution Article I & 8, Ch. 3.* See *110 Congressional Record 7202-12*, 8453-56, (1964); also, the legislative history cited in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245-46 (1964).

APPENDIX G

Employe's Name: Gary McKnight | Position Code: 6M08 | CISCO | S.S. #: 149-44-6286

Department: 9503 | Appraisal Date: 10/24/79

A. OVERALL PERFORMANCE (From Performance Appraisal Review-GM 1427.) Please circle one:

(80) [1] Outstanding Performance [2] Highly Effective Performance [3] Good Competent Performance [4] Needs Slight Improvement [5] Needs Much Improvement

B. EMPLOYE INTERESTS (From Appraisal Worksheet-GM 1426)..... Primary: 251 S/N: S | Secondary: 101

C. FIELDS OF GREATEST POTENTIAL..... Primary: 251 S/N: S | Secondary: 101
(See Codes for Fields of Work)

D. ESTIMATE OF POTENTIAL LEVEL

Current estimate of highest level employe might attain within the next five years.
(Mandatory for employes through 6th level, optional for others.) Please circle one:

(60) [3] rd Level [4] th Level [5] th Level [6] th Level [7] th Level [8] th Level [0] Unclassifie

Current estimate of highest level employe might attain by end of career.
(Mandatory for 7th and 8th level employes; optional for others.) Please circle one:

(60) [3] rd Level [4] th Level [5] th Level [6] th Level [7] th Level [8] th Level [0] Unclassifie

E. READINESS FOR OTHER POSITIONS

Considering the Overall Performance Rating, Employe Interests, Fields of Greatest Potential, and Estimate of P
Level, list up to three positions, identified by GM position codes, that represent logical next assignments in the em
career. These may be promotional or lateral moves. For each position code, indicate the employe's readiness for mo
by checking the box best describing when the employe will be ready for that move.

Position Code	Readiness (in months)			
	(1) 0-6	(2) 6-12	(3) 12-24	(4) More than
6M01	Immediately			
6P11	Immediately			
6A45				X

SIGNATURES:

First level supervisor: [signature] 9/24/79 Date

Personnel: [signature] 1-8-80 Date

Other: [signature] 1-10-80 Date

Second level supervisor: [signature]

Other: [signature] 10/

Other:

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